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Public Prosecutor v HAHS

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HIGH COURT (BRUNEI DARUSSALAM) — CRIMINAL CASE NO 2 OF 2009
HAIROL ARNI MAJID J
7 APRIL 2011

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Criminal law — Rape — Girl below statutory age of consent — Imam accused of raping and outraging modesty of adopted daughter — Whether victim credible witness — Whether victim's complaints to third parties and medical evidence corroborated her testimony — Whether defence story improbable and a bare denial

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A religious officer who was also an Imam ('the accused') was charged in the High Court with raping and outraging the modesty of his 12-year-old adopted daughter under ss 376(2) and 354, respectively, of the Penal Code. The rape was said to have taken place once in 2007 and the outraging of modesty on three occasions in 2008. The victim testified that in each instance, the offences

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were committed in the early morning hours when she was sleeping in her room in the accused's house. The victim described to the court in detail the manner in which each of the offences was committed. Out of fear no one would believe her or that she may be sent to an institution, the victim did not tell anyone about the incidents until she finally confided to her counselling teacher and a

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cleaner at her school because she trusted them. The counselling teacher brought the matter to the attention of the police. A clinical psychologist who examined the victim opined that although young girls of the victim's age could make up stories or act out events to pursue their own plan or interest, the victim herself could not have made up the charges unless she had experienced the

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incidents herself. In his testimony, the accused denied the victim's allegations and said the latter's discontentment with him and his wife started after she was allowed to meet and stay with her biological mother. He said it was impossible for the alleged offences to have taken place as the victim shared a room with the house maid.

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Held, convicting the accused on all charges:

(1) The court was of the view the victim was telling the truth and not making up the incidents. Her complaint to the counselling teacher was

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corroborative evidence of the story that she was sexually assaulted. The medical evidence was also consistent with her complaints that she was raped (see paras 78–79).

(2) The accused's statement before the police was admitted as evidence after having held a voir dire stated that he denied having sexual intercourse

with the victim but admitted to sexually molesting her. These parts of the evidence corroborated the fact and proved the accused had been sexually abusing the victim (see para 81).

(3) Neither the accused nor his wife was a credible witness. His defence was basically a bare denial and her testimony was purely to lend blind support to her husband's cause at all costs. The accused's evidence that the victim made up these stories for the sole reason of wanting to be reunited with her biological mother was improbable (see paras 82 & 85).

(4) The accused, in mitigation, showed no remorse and appeared indifferent to the convictions and to the harm he had caused the victim. There appeared to be nothing that could be said in his favour aside from his clear record (see paras 90).

[Bahasa Malaysia summary

Seorang pegawai agama yang juga merupakan seorang imam ('tertuduh') dipertuduh di Mahkamah Tinggi kerana merogol dan mencabul kehormatan anak angkatnya yang berusia 12 tahun di bawah ss 376(2) dan 354 Kanun Hukuman Jenayah. Kejadian rogol tersebut dikatakan berlaku pada 2007 dan tiga peristiwa mencabul kehormatan pada 2008. Mangsa memberi keterangan bahawa setiap kesalahan tersebut dilakukan pada waktu awal pagi apabila dia sedang tidur di dalam biliknya di rumah tertuduh. Mangsa menceritakan kepada mahkamah secara terperinci cara kesalahan-kesalahan tersebut dilakukan. Kerana takut tiada sesiapa akan percayakannya atau dia akan dihantar ke institusi, mangsa tidak memberitahu sesiapa mengenai insiden-insiden tersebut sehinggalah dia memberitahu guru kaunseling dan tukang bersih di sekolahnya kerana dia mempercayai mereka. Guru kaunseling melaporkan perkara ini kepada polis. Seorang ahli psikologi klinikal yang memeriksa mangsa berpendapat bahawa meskipun gadis muda boleh mereka-reka cerita atau berlakon bagi tujuan menjalankan perancangan atau kepentingan mereka, mangsa tidak boleh mereka pertuduhan-pertuduhan tersebut melainkan dia telah mengalami insiden-insiden tersebut sendiri. Di dalam keterangannya, tertuduh menafikan dakwaan-dakwaan mangsa dan mengatakan bahawa mangsa tidak berpuas hati dengannya dan isterinya dan ini semua bermula apabila dia dibenarkan berjumpa dan tinggal dengan ibu kandungnya. Dia mengatakan bahawa adalah mustahil kesalahan-kesalahan yang didakwa boleh berlaku memandangkan mangsa berkongsi bilik dengan orang gaji.

Diputuskan, menyabitkan tertuduh ke atas kesemua pertuduhan:

(1) Mahkamah berpendapat mangsa memberitahu kebenaran dan tidak mereka-reka cerita. Aduannya kepada cikgu kaunseling menyokong

keterangan cerita yang dia telah diserang secara seksual. Keterangan perubatan juga konsisten dengan aduannya bahawa dia telah dirogol (lihat perenggan77–78).

(2) Kenyataan tertuduh di hadapan polis diterima sebagai keterangan selepas menjalankan *voir dire* menyatakan dia menafikan mengadakan hubungan seks dengan mangsa tetapi mengakui mencabul mangsa. Bahagian keterangan ini menyokong fakta dan membuktikan bahawa tertuduh telah mendera mangsa secara seksual (lihat perenggan 81).

(3) Tertuduh dan isterinya bukan merupakan saksi yang boleh dipercayai. Pembelaannya hanyalah penafian semata-mata dan keterangan isterinya adalah semata-mata untuk membantu suaminya secara membuta-tuli dalam apa jua keadaan sekalipun. Keterangan tertuduh bahawa mangsa mereka-reka cerita bagi tujuan untuk disatukan dengan ibu kandungnya adalah tidak mungkin benar (lihat perenggan 82 & 85).

(4) Tertuduh, semasa mitigasi, tidak menunjukkan sebarang keinsafan dan kelihatan tidak acuh terhadap sabitan-sabitan dan kecederaan yang dilakukannya ke atas mangsa. Tiada apa-apa yang boleh dikatakan bagi memihak kepada tertuduh selain daripada rekod bersihnya (lihat perenggan 90).]

Notes

For a case on girl below statutory age of consent, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) para 3213.

Cases referred to

Ahmad Bin Hj Ibrahim v PP (Criminal Appeal No 8 of 2004), CA (refd)

Legislation referred to

Evidence Act (Cap 108) [BR] ss 117B, 134A, 157
Penal Code [BR] ss 350, 354, 375, 376(2)

Suhana bt Sudin (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Defendant in person.

Hairol Arni Majid J:

[1] The defendant who is unrepresented claims trial to a charge of rape an offence under s 376(2) of the Penal Code and another three counts of outraging modesty on his adopted daughter under s 354 of the same. The prosecution alleges that the defendant had on one occasion in August 2007 and three occasions in 2008 committed rape and outraging modesty on the his adopter daughter respectively.

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THE PROSECUTION CASE

The complainant's testimony

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[2] The complainant is 15 years old, born on the 13 April 1995 and currently staying at Komplex Rumah Kebajikan at Pulaie also known as Taman Nur Hidayah since 2008. Prior to 2008, she was staying at Kg Perpindahan Lambak Kanan with her adopted parents ie the defendant and his wife.

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[3] She said her biological mother is in Limbang and sometime comes down to Brunei whilst her biological father is still serving prison sentence. She has one biological sibling being an older brother staying with her grandmother in Kg Ayer. The defendant and his wife adopted her since she was two years old. There were eleven people staying in Lambak Kanan including her grandparents and a maid. She said her adopted parents have four children who are younger than her. She considers the defendant and his wife to be her real parent.

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[4] In 2009, she attended Mentiri Secondary School. Prior to that, she was schooling at Pengiran Anak Puteri Masna School for only three months. She said she doesn't like living with her adopted parents because the defendant had 'disturbed her' meaning raped her. She said these happened in 1999 until 2008 since she was four years old. She recalled it was during the time after her adopted mother gave birth when the defendant took advantage of her.

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[5] When asked to clarify further what she meant by rape, she said at that time she was on the ground floor then the defendant brought her to another room. She couldn't recall where the room was, she said the defendant made her lie down and inserted his private part into hers. When asked what she meant by this, she said, 'he raped me'. When inquired what she meant by 'his private part', she said 'his thing that he uses to pass his urine'. She was lying on her back and the defendant was on top of her when he penetrated her. She said she did not see the defendant private part. She couldn't recall how many times the defendant disturbed her. But she remembers there were occasions in August 2007, January 2008, February 2008 and the last being on 11 March 2008. As well she was able to remember the event in 1999 because it was the first incident that the defendant assaulted her.

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[6] She said it happened again in August 2007 as a result she ran away from home in September 2007 because she could not stand the defendant. In mid-August 2007, she recalled sleeping alone in her bedroom on the first floor where the defendant went into her room. She said the defendant fondled her breast and touched her private part. Then she said he went down and removed her panty then raped her by putting his private part into hers. She said she was

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angry because the defendant had done it to her although she did not show any anger. She couldn't fight the defendant because she was afraid of him. She thinks of the defendant as being bad tempered. She said she was afraid even to shout for help. She couldn't remember how long the defendant was inside her and whether he ejaculated. She did not tell anyone because she said she was ashamed of it and fear that no one will believe her. She recalled it was the defendant who had taken off her cloth and underwear although she couldn't remember what she and the defendant were wearing.

[7] The house where the complainant lived with the defendant is a two-storey house with six rooms including the toilet. The complainant said her grandparents and the maid sleep upstairs. There are also another two rooms for storeroom and the other one being empty. She said she shared a room with the maid upstairs. It has two single beds. She occupy one and the maid the other. Whilst she slept in the room alone, the maid actually slept on the ground floor. When the incident on August 2007 took place she said the maid slept downstairs. She said the defendant entered the bedroom from via a wardrobe which has an opening leading to an empty room.

[8] She did not inform anyone about this incident because she was afraid no one would believe her. She recalled she was 12 years old at the time and was in primary six at Lambak Kanan Primary School. In September 2007 she said she ran away from her house and stayed at her friend's house. Her friend's name is Azrina. After attending religious school she followed Azrina home back to her house and stayed there for one night and two days. She doesn't know if the police was alerted but she said the defendant went to Azrina's house to fetch her.

[9] She was brought to Berakas Police Station although she couldn't recall what she informed the police because she said it was so long ago. What she remembered was she was afraid to inform police for fear of being placed at Taman Nur Hidayah. Her adopted mother scolded her when they arrived at the house. When her adopted mother impressed on her why she had ran away, she merely told her she had met her biological mother. She said she could not tell her adopted mother the truth fearing the latter would not believe her.

[10] After the August 2007 incident, she claims the defendant disturbed her again in January 2008. This time she was sleeping on the ground floor of the living room with the maid sleeping. Her adopted mother had asked her to sleep on the floor because she said she had difficulty waking up in the morning if she sleeps in her room upstairs. She informed the court her usual routine being that as soon as she got up in the early morning she would tidy up things, washed bottles, sweep the floor and then pray. Her adopted mother asked her to do these chores.

[11] She recalled while sleeping on the floor, the defendant inserted his finger into her private part. She doesn't know if the maid sleeping next to her realised what happened. She was angry with the defendant for doing this but did nothing. She pretended to sleep when the defendant was doing it to her because she said she was afraid of being scolded. She did not want to inform the maid of the incident that was the reason why she did not wake up the maid. Even if she did, she feared the maid would inform her adopted mother. She also did not inform her adopted mother for reason being that the latter would not believe her and instead would be angry with her.

[12] When asked to clarify what a private part is, the complainant by using the anatomical doll pointed to the vagina part of the doll. In reference to the defendant's private part, she pointed to the male anatomical doll's penis. When asked to demonstrate what she understood by 'he put his thing into my private part' she inserted the male anatomical doll's penis into the baby doll's vagina. She said she doesn't know how long the defendant's was inside her. In January 2008, when the defendant inserted his finger inside her she did not inform anyone about it the next day.

[13] She also recalled on the early morning in February 2008, while sleeping on the ground floor in the living room, she realised the defendant was rubbing his private part on hers and saw him on top of her. She remembers the maid was sleeping next to her about 10ft away when it happened. She couldn't remember what he was wearing at that time but she recalls he was wearing a long pant. The defendant removed his long pant and her panty. She couldn't remember if the defendant was wearing a shirt and does not know how long he was on top of her. She said the maid next to her was sleeping. After he finished the defendant went back to sleep in his room.

[14] As regards the 2008 incidents, she said she informed her teacher Ampuan Serbanun, the school counseling teacher about it. On the 11 March 2008, at the early morning hours she said the defendant fondled her and put his finger inside her private part. She recalls sleeping on the floor in the living and was awoken by the defendant fondling of her and touching her private part. She knew it was early morning because she managed to look at her watch. She said she usually wakes up around 4am. She said her adopted mother asked her to wake up at 4am everyday to wash bottles while waiting for *Subuh* prayer to start. After *Subuh* prayer she said she would washed and dry clothes and then cleaned the house.

[15] She said she was touched around 2am. When pointed out by the prosecution that her early testimony says it was *Subuh* prayer, she clarifies that to her 2am is *Subuh* prayer time. She said that she did all the household chores after the defendant had touched her that early morning. She clarifies around

2am she was awoken by the defendant when his hand was inside her panty with his fingers inside her private part fondling it. She pretended to sleep to avoid the defendant getting angry with her. She was adamant it was the defendant because she claimed she opened her eyes slightly and saw him. She said the defendant was on her right side when he was doing it. She couldn't remember if he was sitting on the floor when he did it. She said she did not fight him because she said afraid he might get angry and beat her up. She let him do it because she said he had beaten her up before.

[16] She said she did not like staying at home as she felt restrict and had no freedom. She said her adopted mother and the defendant constantly control her and they were a bit rough on her. She said they made her work and made to be treated like a slave and was not treated like their own daughter. She was made to do the household chores whilst the maid just sat at home. She does not like her adopted mother and the defendant because both of them were fierce but she said she likes her adopted brother, sister and grandfather but not so her grandmother.

[17] She recalled informing her counseling teacher, Cikgu Ampuan Serbanun, in February 2008 of the incident. She said she could not remember how it came about. She remembered informing Makcik Mega, a cleaner at the school of her problem. She informed Makcik Mega because she said she was constantly getting scolded at home. She likes Makcik Mega that was why she willingly poured her hearth out to her.

[18] Regarding Cikgu Ampuan Serbanun, she recalled telling her about how she was constantly getting scolded by her adopted parents and of her being disturbed by the defendant. She said she had more than one meeting with the Cikgu Ampuan Serbanun but she couldn't do anything else about their meeting except that Cikgu Ampuan Serbanun brought her to the police station after the meeting. She couldn't remember which police station they went to except that she recalled meeting Insp Halimah and being brought to Taman Nur Hidayah.

[19] She recalled making a statement at the police station. After that she was brought to the hospital when she said a doctor examined her private part. Later she was brought back to the house. At the house she recalled showing the police where the incidents happened.

[20] In cross-examination, she said she did not inform her adopted mother for fear she would get angry with her instead. She was adamant that she ran away in September 2007 because she had been raped and disturbed by the defendant. She said she knew about her being an adopted daughter since she was two years old because her adopted mother told her then.

[21] She said she couldn't personally remember what the defendant was wearing the night when the defendant raped her on the first floor of the house because it was long time ago. As to the event in January 2008 she couldn't remember if the light was off.

[22] She said she dared to accuse the defendant because she said he had violated her dignity and that the incident actually happened. She said she is sure that the defendant private part entered hers. She said she did not inform her adopted mother because she was sure she would not believe her.

[23] Ampuan Serbanun Ampuan Hj Yusuf ('PW2') is a teacher who took up fulltime counseling since 2007. She testified that in 2007 she was teaching at Pengiran Ak Puteri Masna School until 2009 as a counseling teacher. She said she knew the complainant when she was referred to her by Hjh Mega, a school cleaner who informed her that the complainant was always crying and was not at ease at school.

[24] She recalled meeting the complainant on the 16 February 2008 around 8.30am at the PAP Hjh Masna School. She said at this first meeting, she asked the complainant to sit in front of her and her first impression of her was the complainant looked down. She then inquired into the complainant's background. The complainant informed her she had run away in September 2007 from home to her friend's house. Her friend's name is Azrina.

[25] The complainant told her, she was always being insulted by her adopted mother and got blame for minor blunder she committed in the house. As a result, she would be hit by a broom and ordered to sleep on the floor by her adopted mother. She felt no one was protecting her.

[26] PW2 said she had another appointment with the complainant on 20 February 2008 at 7.45am. The complainant at this time explained that her adopted father had committed improper acts towards her. She said he had fondled her since she was four years old and that it happened again in 2008. She assured PW2 that she was telling the truth. PW2 advised her to inform her if the same thing happened to her again.

[27] PW2 discussed the incident with her school principal who instructed her instead to wait for evidence. She said on 28 February 2008 the complainant gave her a piece of paper. The complainant said to her that the defendant fondled her breast and private part. Similarly, on the 11 March 2008, the complainant saw PW2 again and showed her something written on a piece of paper. She told PW2 that the defendant fondled her breast and her lower part.

[28] Having received this information, she said she approached the principal

who instructed her to call JAPEM a department dealing with the welfare of children who advised her instead to refer the matter to Women and Children Abuse Unit of the Police Department. She said she brought the complainant to the Women and Children Abuse Unit the next day on the 11 March 2008 around 8am to meet with Insp Halimah. PW2 said the complainant was crying when she told her about her problem. She looked sad, upset and depressed.

[29] Chief Inspector Halimah Nayan ('PW3') in her statement to court states that she received Ampuan Serbanun Ampuan Hj Yusuf, PW2 with the complainant at the Women and Children Abuse Unit. She interviewed the complainant and asked her to explain in brief what her complaint was. With the aid on anatomical doll, the complainant informed Chief Inspector Halimah that the defendant had fondled her private part, put his fingers inside her and rubbed his penis on her private part. As well she complained that the defendant had raped her in August 2007. She then instructed the complainant to lodge a police report. She said the complainant refused to go home and requested to be put up at a welfare house.

[30] On the 11 March 2008 around 1725 hours, the defendant was brought to the Women and Children Abuse Unit after being arrested of the alleged offence against the complainant. Chief Inspector Halimah informed the defendant that his statement was to be recorded the next day. She recorded the defendant statement on the 12 March 2008.

[31] As regards her interview with the complainant, she said the latter was able to explain and illustrate what had happened to her by the use of the anatomical doll. She observed that the complainant was able to illustrate with the use of the doll how the penis was inserted into the vagina.

[32] Hjh Megawati Hj Md Yaman, PW4 is a cleaner and acts as assistant teacher at Lambak Kanan Secondary School. She testified that prior to Lambak Kanan, she worked as a cleaner at PAP Hj Masna School some five years ago. She testified that at PAP Masna Secondary School she was a cleaner and as well assigned by the school to help with the sport section of the school.

[33] She said she recalled the complainant being a student at the school who usually cry at the school hall when she opened the school door. She recalled the complainant usually sitting on the stair of the hall. At one time in 2008 when the complainant has just entered form one, she said the complainant told her she had family problem and was crying. The complainant told her that she was treated like a maid at home. She said the complainant followed her everywhere she went and asked her not to leave her. She said the complainant looked frightened and almost everday was crying until eventually she referred the complainant to counseling, specifically to cikgu Ampuan Serbanun, PW2.

[34] In cross-examination, she said she offered to adopt the complainant because she pities her. As well it appeared to her that the complainant had a family problem and looked undecided. She said the complainant was worried about her parent as well.

[35] PC 3786 Sharin Hj Majid PW5 in his statement under s 117B testified that he was instructed along with other members of the police from Women and Children Abuse Unit to apprehend the defendant. On the 11 March 2008 around 1628 hours he and a party of men arrived at a mosque at Jalan Pasir Berakas and managed to arrest the defendant who at the time outside the main door of the mosque. They brought the defendant to Women and Children Abuse Unit to be detained for further investigation.

[36] On 29 March 2008, PC Sharin together with Chief Inspector Halimah accompanied by the complainant went to the complainant's house at No 24, Spg 48 Jln 49 Perpindahan Lambak Kanan for further investigation of the scene. He took photograph at the place.

[37] Sgt 1403 Pg Hjh Rohani Pg Hj Idris in her statement to court arranges other that she recorded the statement of the complainant who she said look very sad. She instructed PC 3786 to take photographs at the alleged scene of the crime and L/Cpl 3761 to make sketch plan of the place.

[38] Dr Hjh Roselina bt Dato Yakub, a specialist obstetrician and gynaecological at Raja Isteri Anak Saleha Hospital examined the complainant when the latter was brought before her. Having examined her she opined that as regards the complainant's private part, she found no tear or bruises on it. She found the outline of the complainant's vaginal orifice to be irregular for a young girl and as well there was presence of laxity of the edges of the vaginal orifice in consistence with the finding of such orifice for this age group. It was laxed because when she examined the complainant with an instrument by inserting the same inside her, she found the instrument went in easily without her feeling any pain which in her opinion is rare for the person of the complainant's age group.

[39] She clarifies that what she means by irregular orifice is that vaginal orifice changes as a woman grown older and as the complainant denies ever using tampon during her menstrual period, Dr Hjh Roselina is of the view that the complainant's vaginal orifice is not usual or normal as appear in girls of her age group. She also took samples of swabs from the complainant and Dr Telesinghe conducted tests for spermatozoa, prostate specific antigen and gonococci the outcome of which was negative. Dr Hjh Roselina concludes her testimony saying that penetration by a male adult with a regular size penis on

A the victim is possible. As well, she opined there is possibility of vaginal penetration by an object such as a finger or others.

[40] The prosecution sought to admit statement of one Froki Emiliawati a domestic helper who was at the time alleged offences working with the defendant. WPC 4921 Trishatha Mashelene bt Prait, PW10, recorded her statement. I allowed the application on condition of the latter being called to testimony and the statement be tendered through her.

[41] Froki Emiliawati's statement says that she worked for the defendant since November 2006. She describes her employer's house as a two-storey house with three rooms on the first floor and two rooms and a living room on the ground floor. She states she and the complainant occupies a room on the first floor but at the request of her the defendant's wife, they were asked to sleep downstairs at the living room near the defendant's room so make it easier for her to prepare milk for the defendant's wife who has just give birth.

[42] In the living room both the complainant and her sleeps together although the distant is not close. She states the complainant sleeps near the table and TV area near the defendant's room. She states almost always when the fan in the living room is switched on, the complainant would urinate in her sleep and this made the defendant furious. She had on several occasions at midnight noticed the defendant checking on the complainant whether she had urinated in her sleep and asked her to change her pants.

[43] Dyg Alinah Hj Tamin, PW11, a clinical psychologist with RIPAS Hospital Ministry of Health gave evidence that the Women and Children Abuse Unit referred to her the complainant on the 13 March 2008 for psychological evaluation for alleged sexual abused. She found the complainant in her interview with her to answer the questions reluctantly and took her time to answers them. When questioned as to the rape incident, she found that the complainant was not quite comfortable to talk about it and she had to keep questioning her incident to get the story out of her.

[44] The relevant part of the report is of her interviews of the complainant is as follows:

> Miss X reported she had been 'disturbed' by her adopted father since she was 4 years old at her home, at night, while she was sleeping, in her bedroom or guest room. Her younger siblings were not disturbed as she always 'protect' and 'keep an eye' on them. The last rape happened on 10/3/08. She reported to the cleaner in her school that her adopted mother was hitting her a few days before the 10/3/08. The cleaner then reported it to the counseling teacher in the school where she had to tell the whole truth.

The adopted father would first ask her to wake up but she would not wake up. He disturbed her by putting his hand under her bra and underwear, then touched her breasts and private part, rubbed his private part into hers, put his finger inside her private part, and put his private part into hers. She could tell his private part was hard then and it really got inside her as she could feel it and it hurts. She added he would wipe his semen when it came out. She felt angry whenever she was 'disturbed' by the adopted father. She tried to stop him but he just forced her and carried on doing it to her.

She still remembers about what the adopted father had done to her while she is at Taman Nurhidayah, when she was alone, or when her friends there share similar problems with her. She would feel angry and sad whenever she remembers it.

From the assessments and her reported, Miss X indeed reported she was raped by her adopted father since she was 4 years old. It appeared that Miss X understood what happened but was unable to stop it because she was forced. She was able to recall the incident in fairly good detail. She had nothing to gain from making up stories about being 'disturbed' by someone whom she regard as a father and someone who had been looking after her since she was 2 years old. Furthermore, it only caused her great distress and shame and guilt to think about it or when reporting it.

[45] In cross-examination, Dyg Alinah was asked by the defendant whether young girls within the age range as the complainant are able to make up stories or act out events in order to pursue her own plan or interest as may be the case here. She opined that it would be very difficult for a 12 years old to make up stories as in this case unless the girls had experience it themselves. She adds that every child is opened to making up stories as each child is different but she opined that the complainant could not have relate to these experience unless she had been exposed to it.

THE DEFENDANT'S CASE

[46] The defendant elected to give sworn testimony and tendered to court a statement under s 117B to be adopted as his evidence in the trial. The statement when first tendered came to some 19 pages and later he further informed the court he had additional 30 pages as a supplement to the earlier one tendered. Having scrutinised the statement, most of the contents are in my view submission and argument, which I will treat as such. I can see the difficult on the part of the defendant being unrepresented to distinguish from his version of his story to his submissions to the court.

[47] The defendant at the outset of his testimony says he is slow in understanding and following the questions in the trial. Also he says he stutters and has a delayed speech impediment since he was small.

[48] As regards the complainant, he says she is his adopted daughter. His

A mother in law is the elder sister to the complainant's biological father, which makes the complainant the defendant's wife cousin. He says he and his wife took the complainant into their home in 1999 when the complainant's father was undergoing his person sentence.

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[49] He admits to helping his wife taking care after the complainant including bathing her, putting her clothes on, giving her food and putting her to sleep when she was still very young. He says it never cross his mind to take advantage of her as he considers her as his own daughter.

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[50] In 2004, the defendant says the complainant had voiced her intention to his wife to meet her real mother. The complainant informed them her school friend had told her that her biological mother is still alive. The complainant's wife reassures the complainant that they did not know the whereabouts of her D real mother.

[51] In August 2007, again the complainant voiced her intention to meet her real mother but only to be informed by the defendant's wife that they do not know her whereabouts. He says the complainant ran away in August 2007 after E attending religious school. This prompted the defendant to lodge a missing person's report on the night of the 4 August 2007. However she was found the next day staying at her friend's house named Azrina. They took her home and inquired why she had run from home. She said she wanted to see her real mother who she was informed to be in Brunei at the time.

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[52] The defendant's wife then contacted the complainant's brother to get the complainant's mother's telephone number. Having received the information, the defendant's mother contacted the complainant's real mother and discussed certain matters with her and decided to allow the complainant to G meet the real mother by sending her to a house at Kg Subok where she lived.

[53] The defendant then informed the police at Berakas Police Station of the complainant's status on that the latter had been found. But the police H instructed that she be brought to the station for interrogation. The defendant brought the complainant to the police station accompanied by his wife. He says they were not allowed to accompany the complainant during the interrogation.

[54] The defendant says that the complainant never informed or complaints I to the police that she was ever raped or disturbed by him during that questioning.

[55] At the end of the interrogation, the police informed them that they were not allowed to surrender the complainant to her real mother, as the latter has no

stable life nor a proper house. Then the defendant went back to the complainant's real mother's house and allowed her to stay there from the 5 August to the 10 August 2007. A

[56] Continue from the date, the defendant says the complainant would see her real mother every weekend and sleeps at the latter's house. In September 2007 during the school term holiday, she spent the whole holiday with her real mother and was only back when the school reopened. B

[57] In December 2007, the defendant says the complainant stayed with her real mother at her house for more than three weeks during the holiday. C

[58] On the 14 January 2008, the complainant stayed at her real mother's house as they intended to visit her real father in prison with her brother the next day on the 15 January. The defendant says he and his wife fetch the complainant from her real mother's house on the evening of the 15 January 2008. D

[59] The defendant says after 15 January 2008, his wife informed him that the complainant wanted to stay with her real brother at her grand mother's house. But he says his wife was undecided about this. E

[60] On the 11 March 2008, the defendant says the morning before he and his wife sent the complainant to school, his wife had taken the complainant's mobile phone because she had refused to revise her study. The defendant says this was the last time he met the complainant before the police took him to Ong Sum Ping CID quarters. F

[61] The defendant says that his wife gave birth on the 31 May 1999 and prior to this on the 30 May 1999 around 8.30pm, his wife was already inside the labour room. He says he decided not to go home and stayed at RIPAS with her. Around 3.30am on the next day ie 31 May 1999 his wife delivered her baby and he says all those while between 30 May and 31 May 1999, he was not at home but was at RIPAS Hospital instead. He is adamant that he was not at home to have committed the offence. He says the complainant was accompanied sleeping in the same room with the maid, Froki Emiliati on the night of the alleged offence the complainant was not sleeping alone in the room. G H

[62] As regards the rest of the charges, the defendant says the light downstairs in the living room where the complainant and the maid slept would be switched on every night, a routine and normal practice. He says it would impossible for the alleged offences to have happen given the maid been always sleeping next to her. Further the place of the alleged incident was basically a I

walkway that leads to the kitchen, toilet and exit door of the house. As such he says it is such an open area. From the period of 1999 – 2008, the complainant did not make any complaint of sort of any sexual complaints against him.

[63] He says the complainant's discontentment with him and his wife started after the complainant was allowed to meet and stay with her real mother. Since then the defendant feeling that he and his wife's actions were questioned by the complainant and were always compared to her real mother. He says she's not happy with the house rule in that she's not allow to sleep late, go out with her friends, using the headscarf, praying and having to wash her own cloth if she urinated in her sleeps. As well the complainant always long to see her brother and stay with him at Kampong Bolkiah.

[64] The defendant says these gave the complainant motives to incriminate him and his wife and to frame him with the allegations against him.

[65] In cross-examination, the defendant said the complainant slept in the same place with the maid was because since the arrival of the newborn baby, they were short of rooms. He always regards and treats the complainant as his own daughter. It was in 2004 when the complainant found out she was an adopted child. She said her friends informed her of this.

[66] The defendant disagrees with the suggestion that the complainant ran away in 2007 because she had sexually assaulted by him. He disagrees that the complainant had failed to report the matter to the police was due to her fear of being placed at Taman Nur Hidayah. The defendant was adamant that the complainant made up her allegation against him because he and his wife had refused her to see real mother.

[67] He said he did not physically check on the complainant if she urinated in her sleep. He merely asked her to wake up and change her pants. He said he could smell her if she urinated on her bed when he entered the living room. He admits to wiping, cleaning and changing her only when she was still a baby not when she was already 12 years old.

[68] The defendant called his wife, DW2 to the stand. She said the complainant had always wanted to meet her real mother that she wrote a letter to her in 2005. She said the complainant ran away in 2007 because she really wanted to meet her real mother. She has allowed for her to live with her real mother but the latter was not able to support the complainant.

[69] As regards the complainant's relationship with the defendant, she has never seen or sense anything suspicion about their relationship. She said the complainant slept in the same room with Froki, her maid and the fact that the

area was a walkway and the lights being always on gave very little opportunity for the allegation to have happened. She admitted that the complainant usually urinated in her sleep during the night as she could smell it and that her maid usually informed her of this.

[70] In cross-examination, she is adamant that the defendant could not have done what was alleged against him. She believes him to be innocent. She said the fact that she allowed the complainant to sleep in the same place, as the maid does not suggest that the complainant was treated like a maid and discriminated as such. She believes the complainant had made up all the allegations against her husband.

THE LAW

[71] Rape is defined under s 375 of the Penal Code as follows:

> A man is said to commit rape who except in the cases hereinafter excepted has sexual intercourse with a woman under the circumstances following under any of the following:
>
> (a) against her will
>
> (b) without her consent
>
> (c) …
>
> (d) …
>
> (e) with or without her consent when she is under 14 years of age.
>
> Explanation — Penetration is sufficient to constitute the sexual intercourse and necessary to the offence of rape.

[72] As regards corroboration, no longer is there such requirement under the law in sexual cases as s 134A of the Evidence Act has effectively done away with that requirement. It is now merely as a matter of procedure for the court to look for corroboration especially in cases involving complainants of a young age.

[73] Complaints made by a victim in a sexual case by virtue of s 157 of the Evidence Act (Cap 108) may amount to corroboration. Obviously not all the complaints recited by the complaints to all persons that she/he met amount to corroboration. At the very least they may show consistency therefore courts should proceed with care in treating and accepting which complaints may amount to corroboration.

[74] As regards the offences of outraging modesty s 354 of the Penal Code states:

354. Whoever assaults or uses criminal force to any person, intending thereby to outrage, or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to 5 years and with whipping.

[75] Whereas criminal force is defined by s 350 of the Penal Code as 'whoever intentionally uses force to any person, without that person's consent in order to the committing of any offence, or intending by the use of such force, to cause or knowing it to likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used is said to use criminal force to that other'.

FINDINGS

[76] The complainant at the initial stage of her testimony was not totally at ease and comfortable giving her testimony in front of the defendant. But she continued to do better as the trial continuous and was able to communicate her answers well although most of the time short and very much in need of elaboration. Understandably being a girl of young age her story was told not in the sequence of event as one would normally find in an adult complainant. She kept jumping from one incident to another. Despite that overall, she was able to give her testimony clearly and directly.

[77] I believe that the complainant was angry with the defendant. This was clearly evident during the defendant's cross-examination of the complainant where she would answer in a loud and an angry tone to most of the questions posed by the defendant. Having seen the complainant in court, I find her to be an ordinary 15 year old and able to articulate her ideas and argument well. I have no hesitation that she is telling the truth and was not making up the incident. I believe she was reciting her version of the incident through her own experience as a 15 year old child.

[78] As regards corroboration, I find the complainant's complaint to Ampuan Serbanun (PW2) to be corroborative evidence of the story that she was sexually assaulted. Prior to PW2 bringing the complainant to the police on the 11 March 2008, the complainant had on two occasions on the 20 and 27 February complained to PW2 about the sexual assaults. As regards the complainant's report to the police, this part of the testimony may amount to corroboration of her evidence that the defendant sexually assaulted her. However in this case, the complaint originates from her as such essentially self-serving and I believe could not be equated with independent evidence. The same case also be said to her complaint to Chief Inspector Halimah Nayan, Hjh Megawati Hj Md Yaman and Dr Hjh Roselina bt Dato Yakub because essentially the complainant was repeating her story to them and would not

amount to corroboration under s 157 of the Evidence Act. Having said that, I have no hesitation in finding that this evidence is consistence with the complainant's.

[79] Having analysed the complaint's evidence, I conclude that she had been consistent with her version of her allegation against the defendant that she had been rape and her modesty had been sexually outraged.

[80] The medical evidence namely the lax in the complainant's vaginal orifice although not conclusive proof that it was solely due to sexual intercourse, but its finding is consistent with her complaints that she was raped. The clinical psychologist, Alinah Hj Tamin's testimony that girl within the complainant's age group would find it difficult to make up stories unless they had experienced it themselves is consistent with the fact that the complainant is telling the truth. I believe that the complainant was relating to facts, which she had been exposed to and gave evidence as it happened.

[81] The defendant's statement before the police was admitted as evidence after having held a voire dire states that he denies having sexual intercourse with the complainant but admitted to sexually molesting her. These parts of the evidence corroborate the fact and are proof that the defendant had been sexually abusing the complainant. Although the questions asked and the answers given in the statement do not provide any specifics as to dates and to which particular charges it relates to but I believe that the defendant committed them on various occasions. In relation to the answers to questions 16, 17 and 18, I believe these were committed in relation to the first charges as it occurred in the late night, on the first floor of the house when the complainant was sleeping alone in her room.

[82] Having accepted the complainant's evidence, I do not find the defendant to be a credible witness. His main defence is basically one of a bare denial. I do not accept the defendant's evidence that the complainant would go out of her way to make up these stories for reason solely of wanting to go back to and be reunited with her biological mother. Accepting Alinah Hj Tamin's assessment of the complainant, I believe it's not probable for the complainant to make up such allegations.

[83] The fact that the complainant only made the complaint in 2008 was because as she repeatedly said in her evidence it was purely out of fear that nobody would believe her. I believe it was with the encouragement and moral support given by Hjh Megawati Hj Md Yaman (PW4), and Ampuan Serbanun Ampuan Hj Yusuf (PW2), that the complainant eventually come clean with her story. I believe this is so, only after she felt secured that somebody finally

would protect her. The discovery of the abuses was only clearly unraveled as the investigation continues and the complainant started to feel comfortable and secured with her surrounding.

[84] I do not accept the defendant evidence that he was merely checking on the complainant on most mornings whether she urinated in her sleep. I believe the defendant took the opportunities to check on her and to do what he did. Froki Emiliati's testimony that the distance between her bed and the complainant's could not be described as near and this gave the opportunity for the defendant to take advantage of the complainant under the pretext of being concerned with the complainant's welfare. I also reject his evidence that the complainant ran away solely because she wanted to be with her biological mother. I believe she ran away because he had sexually assaulted her prior to that.

[85] As well, I do not find the defendant's wife to be a credible witness nor do I find her testimony to be credible either. I believe her testimony was purely to lend a blind support to her husband's cause at all cost.

[86] There are discrepancies in the complainant's testimony especially as regards to the third and fourth charges, which I consider to be minor and do not by themselves eluded the fact that he committed these acts. She recalled the defendant touching her at dawn about the time for *Subuh* or morning prayer. She was adamant that this was around 2am in the morning. As well she said ran away from home in September 2007. Whilst, the defendant say it happened in August. I can appreciate the difficult of a young victim of having to recite or recall with accuracy events that happened years ago.

[87] Having heard and seen the complainant in court and after having assessed her demeanor, I am in no doubt that she is a truthful and credible witness. I have no hesitation in accepting her version of story as the truth. As regards on first charge, I accept her evidence that the defendant did have a sexual intercourse with the complainant against her will and from her evidence I believe that the complainant was not mistaken about the fact of penetration.

[88] As regards the second, third and fourth charges, I am satisfied the defendant did sexually outraged the modest of the complainant in the manner she described on these three occasions. The credibility and caliber of the complainant's evidence leaves me in no doubt that even in the absence of any corroboration, I am satisfied that on her evidence alone that she was raped and her modesty was outrage by the defendant.

[89] I am satisfied that the prosecution has proved all the charges beyond

reasonable doubt and accordingly I convict the defendant of all charges.

SENTENCE

[90] The defendant in mitigation has shown no remorse and very much appear to be indifferent to the convictions and the harm he had caused to the complainant. There appears to be nothing that could be said in his favour aside from his clear record. He is a religious officer and an Imam as well as a father to the complainant. Obviously, this is a grave breach of trust with serious and enduring consequences for the complainant. The complainant in this case is a young girl and particularly in a vulnerable position to be exploited due to her inexperience and fear of his father if she refuse to comply with his demand.

[91] Taking these matters and paying particular attention to the observation made by the Court of Appeal in *Ahmad bin Hj Ibrahim v Public Prosecutor* (Criminal Appeal No 8 of 2004) when it indicates a starting point after trial of 15 years of custodial sentence and if the offence is repeated, it should attract an increased sentence and that some account to be taken of the fact that force was use, I hereby imposed a custodial sentence of 15 years and ten strokes for the first charge. For the second, third and fourth charges, a sentence of four months and one stroke each. I order the custodial sentence to run consecutively and the strokes cumulative. Therefore total of 16 years and 13 strokes. The sentences are to run with effect from today.

Accused convicted on all charges.

Reported by Ashok Kumar